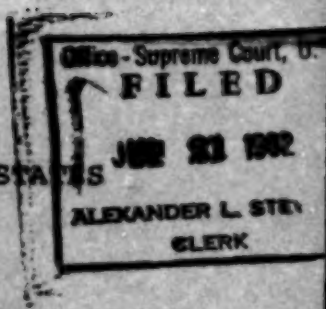
No. 81-2347



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON, and DWIGHT G. HUDSON,

Petitioners,

v.

ARIZONA STATE DENTAL ASSOCIATION, CENTRAL ARIZONA DENTAL SOCIETY, and AMERICAN DENTAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ARIZONA STATE DENTAL ASSOCIATION, CENTRAL ARIZONA DENTAL SOCIETY AND AMERICAN DENTAL ASSOCIATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in view of the fact that petitioners failed to prove any competitive injury to dental practitioners, the trial court's finding that the challenged membership rule does not unreasonably suppress competition between dentists in Arizona within the meaning of Section 1 of the Sherman Act, 15 U.S.C. §1, was clearly erroneous.

2. Whether, since petitioners failed to prove that the respondents practice dentistry, failed to offer any proof of any relevant market, geographical or product or service, the trial court's finding that neither respondents nor their members have monopolized the practice of dentistry within the State of Arizona within the meaning of Section 2 of the Sherman Act, 15 U.S.C. § 2, was clearly erroneous.

RULE 28.1 STATEMENT

The American Dental Association, Central Arizona Dental Society and the Arizona State Dental Association have no parents or affiliates within the apparent meaning of Supreme Court Rule 28.1.

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OPINIONS BELOW

The Court of Appeals' Memorandum Decision affirming the trial court was

entered on March 24, 1982 (Pet. App. 30-32), and was re-filed as an Opinion on June 22, 1982.

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is incomplete and factually misleading. Thus, respondents have been compelled to provide this Court with a detailed factual statement in order to give this Court the same picture of the facts that the district court and the Court of Appeals had in rendering judgment for the respondents.

The Proceedings Below

Petitioners fail to review the full history and course of proceedings which is important in determining that the writ of certiorari should not be granted. The First Amended Complaint which was filed on December 16, 1974 in addition to the antitrust allegations, alleged that ADA

transacted business in Arizona in violation of Article 14, §5 of the Constitution of Arizona and §10-482, Arizona Revised Statutes, and that the membership rules violated the "Constitution of the United States, Article IV, Section 2, Clause 1, and the Fourteenth Amendment." These constitutional allegations were dismissed by the trial court prior to the initial appeal (United States District Court Civil Docket entry number [hereinafter CR] 46) and have been abandoned by petitioners.

Petitioners also failed to include the purpose of the remand articulated by the Ninth Circuit in Boddicker v. Arizona State Dental Association, 549 F.2d 626 (9th Cir.), cert. denied, 434 U.S. 825 (1977). In that opinion the Court of Appeals established the law of the case:

> Further proceedings will provide . . . the plaintiffs the opportunity to show to the extent possible the manner in which they [membership rules] suppress competition between practitioners of dentistry (549 F.2d at 632 (emphasis added)).

The Court of Appeals carefully instructed the petitioners that, on the remand, they retained their burden of proving by a preponderance of the evidence that the membership rules "suppress competition between practitioners of dentistry" (549 F.2d at 632 n. 11).

On the remand, at the conclusion of petitioners' case, the district court, sitting without a jury, entered judgment for the respondents pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. As a result, the trial court entered in part the following findings of fact, after hearing and reviewing all of the evidence:

Any person licensed to practice dentistry in Arizona may become a member of the American Dental Association, the Arizona State Dental Association and the Central Arizona Dental Society (Finding 6, Pet. App. 26).

Membership in the three professional organizations is not necessary for licensing as a dentist in Arizona (Finding 11, Pet. App. 27).

About 25% of the dentists in Maricopa County, Arizona, are not members of the three professional organizations (Finding 12, Pet. App. 27).

Dentists who are not members of Central Arizona Dental Society, Arizona State Dental Association and American Dental Association can purchase services or products sponsored by or distributed by any one of the three organizations. Services and products include attendance at continuing education programs, malpractice insurance and other types of insurance, and subscriptions to The Journal of the American Dental Association and other publications, Guide to Dental Materials and Devices, and various pamphlets (Finding 13, Pet. App. 27).

The requirement that a dentist who belongs to one of the three defendant professional organizations must also belong to the other two does not suppress competition between dentists in the State of Arizona or between dentists in the State of Arizona and dentists in other states (Finding 16, Pet. App. 28).

The district court then entered as Conclusions of Law that the membership rule is not a per se violation of Section 1 of the Sherman Act (Conclusion 1, Pet. App. 28), that petitioners failed to prove by a preponderance of the evidence that the challenged membership rule unreasonably suppresses competition between dentists in Arizona within the meaning of Section 1 of the Sherman Act (Conclusion 2, Pet. App. 28) and that petitioners failed to prove by a preponderance of the evidence that the respondents or their members have monopolized the practice of dentistry within the State of Arizona within the meaning of Section 2 of the Sherman Act (Conclusion 3, Pet. App. 29).

The United States Court of Appeals did not find any of the trial court's findings of fact to be erroneous. It thus affirmed

the district court's findings that no unlawful tie-in was proven as a matter of fact, that petitioners failed to sustain their burden of proving by a preponderance of the evidence that the membership rules suppress competition and that petitioners failed to prove that respondents or their members monopolized the practice of dentistry in Arizona (Pet. App. 30-32).

It is respondents' position that this case only involves the question of the sufficiency of petitioners' proof which the Court of Appeals has correctly decided. There is no division among the Circuits nor does this case raise any important federal questions. It is clear, therefore, that the petition fails to comply with Supreme Court Rule 17 and should be denied.

Nature Of The Case

Petitioners, three practicing Arizona dentists and one retired one, purport to bring this action under §§1 and 2 of the Sherman Act (Reporter's Trial Transcript [hereinafter RT] Vol. 1, pp. 101). However, the evidence in this case shows the real reason that this lawsuit was brought, and that reason had nothing to do with competition in the dental market in Arizona, nor did it have anything to do with the Sherman Act. On the contrary, petitioners testified truthfully that this action was filed only because of political and philosophical objections to the respondent organizations (RT Vol. 1, pp. 119-120, 122; RT Vol. 2, pp. 62-63).

It is not surprising in view of the real motivation in bringing this lawsuit that the petitioners' proof failed to show any

adverse impact on competition among dental practitioners in Arizona as a result of the respondents' membership rule, which burden the Court of Appeals specifically placed upon petitioners on the remand (549 F.2d 626, 632 n.11).

In Arizona, dentists obtain the right to practice through state licensure, and the membership rule does not affect state licensure. In addition, the evidence is that approximately 25% of the dentists in the state and 31% to 35% of the dentists in Maricopa County are not members of the respondent organizations, and that their practice has not been adversely affected by reason of the lack of membership. The record also shows that non-members may obtain the essential services of the respondents on a cost payment basis.

With reference to §2 of the Sherman Act, there is not even a scintilla of evidence in this record that is probative of monopolization. Conceptually since respondents do not practice dentistry in Arizona, it is impossible to show that respondents have violated §2 of the Sherman Act.

Facts

Respondent Associations

Respondents are a federation of non-profit dental organizations whose purpose is "to encourage the health of the public, to promote the art and science of dentistry and to represent the interests of the dental profession and the public which it serves" (Pretrial Order, CR 178, p. 9).

To further these goals, the associations have organized themselves on three levels: national, state and local. The national

association, the American Dental Association ("ADA"), charters "constituent" societies, or state organizations such as the Arizona State Dental Association ("ASDA") (Plaintiffs' Exhibit [hereinafter PX] 2, ADA Constitution and Bylaws, Chapter II, pp. 13-17), and these state associations charter "component" societies such as the Central Arizona Dental Society ("CADS") (PX 2, Chapter III, pp. 17-18).

ADA

ADA's policies are controlled by its members through constituent and component societies. ADA's supreme legislative body, the House of Delegates, is composed of members elected by constituent and component societies and it controls ADA policy (Pretrial Order, CR 178, p. 10).

The reason for this federated membership was that if all dentists nationwide belonged

to one organization there would be a stronger, more unified voice representing dentistry (RT Vol. 2, pp. 50-51).

The ADA engages in significant activities designed to improve the art and science of dentistry including the publication of dental journals and newsletters, dental aptitude testing, dental health programs for children, promotion of fluoridation of public water supplies, dental research, improvement of dental education, promotion of continuing dental education, maintenance of a central dental library and facilitating an interchange of information among dentists (RT Vol. 1, pp. 12-13).

Voluntary And Non-Discriminatory Membership

Membership in the association is purely voluntary and the parties stipulated that "[t]he practice of dentistry is governed by

state licensing requirements, not by requirements of ADA membership" (CR 178, pp. 9-10). The record shows that approximately 25% of the dentists in Arizona do not belong to the dental associations (RT Vol. 1, p. 5), and that 31% to 35% of the dentists in Maricopa County do not belong to respondent associations. Neither ASDA nor CADS receives any money as a consequence of participating in the collection of ADA dues (RT Vol. 1, p. 62). Membership is available to all licensed Arizona dentists.

The Petitioners

This lawsuit was not brought pursuant to Rule 23 of the Federal Rules of Civil Procedure (CR 39) and thus involves only the four dentists named as petitioners (RT Vol. 1, p. 76). Petitioners' counsel conceded at trial that this was not a class action, and the trial court sustained respondents'

objection to purported testimony concerning other non-party dentists (RT Vol. 1, pp. 76-77). Thus, petitioners' references to "all dentists similarly situated" (Pet., p. 6) are not supported by the record, since this case only involves the interests of the four named petitioners.

Dr. Vernon S. Boddicker

Dr. Boddicker testified that prior to his retirement he practiced in Phoenix as a prosthodontist (one who works with dentures) for twenty-eight years (RT Vol. 1, pp. 68-69). Dr. Boddicker was once President of CADS (RT Vol 1, p. 70) and was an alternate delegate to the ADA between 1961 and 1966 (RT Vol. 1, p. 71).

In 1971, Dr. Boddicker presented a motion before the ASDA House to change the membership rules in order that ASDA members would not have to belong to ADA (RT Vol. 1,

p. 99). The proposal was voted down by the ASDA House (RT Vol. 1, p. 100) and Dr. Boddicker never presented a similar proposal to the ADA House.

Dr. Boddicker objects to the ADA because of his political and philosophical opposition to it. He conceded at trial that he would not have brought this lawsuit if ADA leaders had agreed with him politically and philosophically over the years (RT Vol. 1, p. 122).

Dr. Boddicker voluntarily chose not to renew his ADA membership in 1972 (RT Vol. 1, p. 98). He testified that one need not belong to ADA to belong to dental specialty organizations (RT Vol. 1, pp. 73-74), and that his loss of membership in a specialty organization was because of his voluntary conduct (RT Vol. 1, p. 82).

In 1970, Dr. Boddicker sold his practice (RT Vol. 1, p. 102, Exhibit 11H) in order to get a good price for it before he became too old to maintain it.

Dr. Richard W. Peay

Dr. Peay practices general dentistry in Phoenix, Arizona (RT Vol. 1, p. 133). In 1971, he sought to pay dues to ASDA and CADS without paying dues to ADA. He was told that he could not do so and has consistently paid his dues to all three organizations (RT Vol. 1, pp. 138-142).

Dr. Peay has not ever raised his fees as a consequence of his ADA, ASDA and CADS dues (RT Vol. 1, pp. 144-145). Significantly, Dr. Peay expressly testified that the ADA, ASDA and CADS, operating together, promote the improvement of dental services to the public (RT Vol. 1, p. 174).

Dr. Hugh L. Thompson

Dr. Thompson has practiced general dentistry in Phoenix since 1952 (RT Vol. 2, p. 4).

Dr. Thompson at one time sought referrals from the CADS (RT Vol. 2, p. 9). He had his name removed from the CADS referral list because he received calls late at night from patients who 50 percent of the time failed to show (RT Vol. 2, p. 10).

Dr. Thompson views dentistry as a business in certain respects (RT Vol. 2, p. 15), but would never allow economic concerns to override matters of ethics and professionalism (RT Vol. 2, pp. 25-27).

Dr. Dwight G. Hudson

Dr. Hudson practiced general dentistry in Phoenix and Scottsdale for forty-two years (RT Vol. 2, p. 30). He testified that many years ago, dentists could join CADS and

ASDA without joining ADA (RT Vol. 2, pp. 31-32). In the 1930's or 1940's, Arizona dentists voted to affiliate with the ADA organization because of "the fact that if all dentists belonged to this organization that we could represent a stronger more unified voice" (RT Vol. 2, p. 50). This was voted on voluntarily since "[t]hey [ADA] certainly didn't have a club over our heads" (RT Vol. 2, p. 50). He also testified that when ASDA became a part of the ADA we lost control (RT Vol. 2, p. 51).

Dr. Hudson also objects to ADA's political positions, which he testified is the real reason this lawsuit was filed (RT Vol. 2, p. 63).

Dr. Hudson testified that continuing education is available from many sources including the L.D. Pankey Institute of

Advanced Dental Education (RT Vol. 2, p. 53), commercial courses in Phoenix (RT Vol. 2, p. 54), and by simply arranging to observe the work of prominent dentists (RT Vol. 2, pp. 56-57). These courses are of high quality and do not require ADA membership in order for a dentist to attend (RT Vol. 2, p. 67).

REASONS FOR DENYING THE WRIT

SINCE THIS CASE INVOLVES ONLY QUESTIONS REGARDING THE SUFFICIENCY OF PETITIONERS' PROOF THE WRIT SHOULD BE DENIED

When the Ninth Circuit remanded this case after the initial appeal, it did so to permit "the plaintiffs the opportunity to show to the extent possible the manner in which they [the membership rules] suppress competition between practitioners of dentistry", and quite properly stated that "[t]he plaintiffs, of course, retain the

burden to prove their case-in-chief by a preponderance of the evidence" (549 F.2d at 632 n. 11). This established the law of the case.

Rule 41(b) of the Federal Rules of Civil Procedure provides that if judgment is entered against the plaintiffs on the merits, findings shall be entered as provided in Rule 52(a). Rule 52(a) in turn provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". This Court has consistently adhered to this standard of review. See, e.g., United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949); Besser Manufacturing Co. v. United States, 343 U.S. 444, 448 (1952).

Since the Court of Appeals correctly held that the district court's findings were not clearly erroneous, the petition for a writ should obviously be denied. Contrary to petitioners' contentions, because of the complete lack of proof in the record, this case will not have any impact on "thousands of dentists." Nor does this case have anything whatsoever to do with that line of cases dealing with the application of the antitrust laws to the professions. Neither the district court nor the Court of Appeals relied on those cases. The record fully justified the Court of Appeals' affirmance.

It is also an insult to both the district court and the Court of Appeals to suggest that petitioners were treated in a cavalier fashion. Petitioners were given every opportunity to prove suppression of competition among dentists in the trial

court and they failed to do so. The fact that a case with as little substance as this one has managed to remain in the courts since 1974 is tribute to the fairness of the judicial system.

Petitioners Failed To Show Any Unreasonable Restraint Upon Competition

The Sherman Act is only intended to prevent unreasonable restraints upon competition. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). Thus, petitioners were required to come forward with evidence demonstrating that the membership rule at issue diminished competition among dentists.

Such evidence as petitioners did adduce fully supports the district court's finding that the membership rule does not suppress competition. The parties stipulated that membership is not required for licensure in

Arizona (CR 178, pp. 9-10). There is also specific testimony that membership is not a prerequisite to the successful practice of dentistry in Arizona, and that many dentists practice successfully without membership in respondents (CR 123, p. 50; CR 203, p. 20). Thus, the membership rule can have no adverse effect on the practice of dentistry in Arizona.

The record further establishes that any licensed Arizona dentist may join the associations. Moreover, non-members may purchase products and services from the respondents on a cost of service basis. Thus, non-members may take advantage of respondents' services and products (Finding 13, Pet. App. 27), underscoring the completely voluntary nature of the organizations.

Indeed, to the extent petitioners testified as to any injury, it was political, not competitive (RT Vol. 1, p. 122; RT Vol. 2, pp. 51, 61-63).

In the instant matter, petitioners failed to demonstrate any competitive injury, and no effort by petitioners to argue that they represent all of the dentists in the country will change it. As noted earlier, this is not a class action and hence constitutional standing requirements prevent this from being anything other than an action by these 4 petitioners. See, e.g., Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

The Membership Rule At Issue Does Not Constitute A Tying Arrangement

Petitioners failed to prove that this case falls within the traditional definition

of a tying arrangement. In fact, in this instance, where the "products" or "services" are composed of organizations of highly educated members who have chosen to affiliate, that contention is less than serious. Petitioners conceded that the ASDA House of Delegates had rejected petitioners' efforts to withdraw from the national organization (RT Vol. 1, pp. 74, 99-100; RT Vol. 2, pp. 6-7). Such membership organizations simply are not separate "products" or "services" within the meaning of tying law.

Economists maintain that it is even futile to tie products or services that are consumed in fixed proportions such as membership in the associations, and thus further teach us that products or services which are consumed in fixed proportions are

not tying arrangements, they are functionally one product or service:

> Cannot monopoly power be created by tying goods which are used in fixed proportions? The answer is "no" because profits cannot be increased in this manner. To see why, consider the following example. Gloves are consumed in fixed proportions. Very few people would wish to use a right hand glove without using a left hand glove. Therefore, consumers think of the two products as one. Considered as a package, there is a maximum amount that an individual is willing to pay for the two gloves. Suppose it is seven dollars. One glove could be sold at two dollars, but the maximum amount received is still seven dollars. And if a producer tries to sell the first glove at six dollars, he will find that the consumer will no longer purchase from him because he has exceeded the seven dollar limit. It is irrational to tie goods which are consumed in fixed proportions because there is no way that the arrangement can increase profits as compared to a situation where the two goods are sold separately. Warren, Antitrust in Theory and Practice, p. 196 (1975) (emphasis added).

Elementary economics also plainly establishes that the economic issues usually addressed in order to determine if a tying

agreement has possible anticompetitive implications include such things as leverage, i.e., the extent to which a single seller can transfer market power from one market to another; coercion, i.e., the extent to which a seller can force a buyer to take something the buyer does not want; foreclosure, i.e., the extent to which a significant portion of a market is barred from other competitors, and justifications, or offsetting benefits, from the arrangement (Warren, supra, pp. 191-202).

The membership rule simply does not constitute a tying arrangement under traditional economic analysis. The leverage and foreclosure theories do not apply because they are inapplicable to non-profit organizations. The reason for this is that the theories described apply where a profit-making firm that is the leading firm

or dominant firm in one market seeks to extend its market power into another market in order to gain higher profits in the second market. The coercion theory does not apply for the reason that it is applicable to products used in variable proportions and not fixed proportions. The membership organizations would be used in fixed proportions such as the earlier illustration involving the purchase of a left and right glove. A buyer is willing to pay a maximum price which reflects the value of the product or service used in fixed proportions and will simply not purchase the product or service if the price exceeds the maximum. Therefore no coercion is possible. This contrasts with the situation where the products are used in variable proportions such as a case where a dominant computer firm ties to the sale of its computer the

purchase of its computer punch cards (Warren, supra, p. 196).

The fact that we are dealing with membership organizations which could dissolve their membership arrangement with the ADA further undermines the coercion theory.

Although there plainly is no tying arrangement here, petitioners appear to be arguing that the tying product is the Central and Arizona dental associations and the ADA is the tied product. If it is argued that the CADS and ASDA are the tying product and together they attempt to extend their market power into the tied good market (ADA) the appropriate economic test for evaluating the success of that effort would be a restriction of output in the tied good market (See Warren, supra, pp. 203-204). The petitioners failed to prove any

reduction in output in the tied good market.

A review of ADA, ASDA and CADS activities shows that the organizations operate primarily in the market for the dissemination of information to dentists or others interested in dental health (PX 53(b); CR 178, Exhibit A; CR 178, pp. 11-14). That, therefore, is the relevant product market. It is important to delineate a relevant product market in order to determine if competition is affected by the alleged tying agreement. The question is the impact on competition, not on a particular competitor or competitors, and a review of the various dental associations' rules and activities reveals that the ADA operates in the relevant product market we have defined on a national level, ASDA and CADS on a local or regional level.

Dentists, on the other hand, operate in various local markets and submarkets providing dental services to the public. Therefore, a requirement of joining any of the dental associations has no impact on competition because dentists and the associations do not operate in the same market. Moreover, a requirement of joining a dental association in no way limits the ability of an individual dentist to provide dental services to the public (CR 178, pp. 9-10).

The dental organizations are strictly voluntary groups. The State of Arizona, not ADA, licenses dentists to practice dentistry, and Arizona does not require that dentists belong to any of these organizations (CR 178, pp. 9-10). ADA itself certainly does not practice dentistry and it lacks the power to restrict the

output of dental services by dental practitioners. Clearly a requirement that an ASDA member join the ADA would have no such effect.

The ADA, ASDA and CADS are federated membership organizations constituting one "product" or "service", as defined by their members. This structure is emphasized by the fact that each state organization is represented in ADA's House of Delegates, the ADA's legislative body, and that 14 geographically determined Trustee Districts send representatives to ADA's administrative body, its Board of Trustees (CR 178, pp. 10-11). Just as an automobile is one product composed of a frame, an engine, tires and seats designed to provide transportation (even though one might, of course, fit a Chevrolet engine in a Ford automobile), ADA is functionally one

organization composed of local, state and national societies federated to improve the art and science of dentistry. The very terms "constituent" and "component" societies suggest the integrated nature of the organization. Since there is only one "product", there can be no tie-in. See, e.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 512 F.2d 1264 (9th Cir. 1975).

The structure of the dental organizations is a more efficient way of producing and disseminating information. If each local or regional association had to duplicate the information gathering and information disseminating activities that occur at the national level, it would be much more costly and inefficient and result in much higher dues and undoubtedly less

information disseminated (RT Vol. 1, p. 95).

The instant situation is analogous to that in Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981), in which the Court of Appeals held that a requirement by McDonald's Corporation that its franchisees lease a building owned by McDonald's in order to enter into the franchise agreement was not a tie-in. Rather, the lease and the franchise agreement were "integral components of the business method being franchised" (631 F.2d at 309). So too are the levels of ADA membership integral components to the association.

A further gap in petitioners' "tie-in" analysis is the lack of any showing of a direct, common economic interest in the alleged tie. ASDA and CADS obtain no money

as a consequence of participation in the dues collection process (RT Vol. 1, p. 62). A showing of direct, common economic interest is essential to support a finding of illegality. See, e.g., Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977).

Accordingly, the membership rule does not constitute a tying arrangement as a matter of fact and this finding is again fully supportable by the record.

Distinguishing Petitioners' Authority

None of the tying cases cited by petitioners is relevant. Petitioners' principal authority is Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958). In Northern Pacific, the railroad used the considerable market power that it had by virtue of owning 40 million acres of strategically located land as leverage to

force the purchasers of that land to ship their goods on its trains. As such, Northern Pacific represents a situation in which leverage was used by a profit-making entity in one market (land) to transfer or "leverage" market power into another market (shipping) in order to enhance its profits in the second market and foreclose competing railroads. The restraint involved variable proportions since the land was not sold in fixed proportions to the shipping market. Thus Northern Pacific differs from this case because it involves profit-making entities, because the "tied" goods relate to the "tying" goods in variable proportions, and because the railroad had a direct economic interest in the tied market.

Petitioners also cite Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-99 (1969)

(Fortner I), for the proposition that tying arrangements are unlawful per se. But the Fortner I Court held only that plaintiff's case should not have been dismissed on a motion and that plaintiff could attempt to prove market power in the tying good (credit) by showing "uniqueness." However, "uniqueness" meant only that the defendant had some particular economic advantage over competitors (394 U.S. at 505 n.2).

"Market power", in the Fortner II context means that "market power in the sense of power over price must still exist" (United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620 n. 13 (1977) (Fortner II)). In Fortner II, the Court concluded that plaintiffs proved only that U.S. Steel was willing to offer inexpensive credit in order to sell expensive houses. Justice Stevens noted

that the entire concept of tying leverage made no sense because of the fixed proportions of the tying and tied products:

> But in this case Fortner was only required to purchase houses for the number of lots for which it received financing. The tying product produced no commitment from Fortner to purchase varying quantities of the tied product over an extended period of time. This record, therefore, does not describe the kind of "leverage" found in some of the Court's prior decisions condemning tying arrangements (429 U.S. at 617-18).

Thus, the Fortner cases relied upon by petitioners support respondents' position since Fortner II demonstrates that proof of market power is necessary in a tying case and that in order to prove it, the relationship between the tied product and the tying product must be variable and not fixed, and thus market power may not be proven from the "tying arrangement."

PETITIONERS FAILED TO INTRODUCE ANY EVIDENCE WHATSOEVER PROBATIVE OF A MONOPOLY AND THUS RAISE NO IMPORTANT QUESTION OF FEDERAL MONOPOLY LAW

The district court's finding that petitioners failed to prove by a preponderance of the evidence that respondents or their members have monopolized the practice of dentistry in Arizona was fully supported by the evidence, as was correctly found by the Court of Appeals. In their First Amended Complaint, petitioners alleged that ADA has "monopolized" dental care, but they made no effort to prove any monopolization claims under Section 2 of the Sherman Act.

Petitioners failed to define a relevant market, including both a product market and geographic market. See, e.g., Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268 (1934).

After proving the existence of a relevant market, it was incumbent upon petitioners to show that within that market the respondent "has the power to control prices or exclude competition." See, e.g., Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. Grinnell Corp., 384 U.S. 563 (1966).

There was a complete failure of proof because petitioners failed to define the particular product or market that they contend has been "monopolized." Moreover, the ADA or ASDA or CADS simply does not practice dentistry. Therefore, they could not have monopolized dental practice.

Since dentistry is practiced by thousands of individuals throughout the nation who need not belong to the ADA in

order to practice, and since the ADA does not render dental services to the public, a claim of monopolization is at best frivolous.*

CONCLUSION

The petition for a writ of certiorari should be denied because it does not comply

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* Areeda and Turner state that "[m]onopoly exists when one firm controls all or the bulk of a product's output, and no other firm can enter, or expand output, at comparable costs. In such circumstances, the firm has the power to raise price[s] above competitive levels by restricting its output, because the output reduction cannot be offset by expanded output of others." 2 Areeda and Turner, Antitrust Law, §403(a), p. 271 (1978). ADA controls none of the output of dentistry, since any dentist can practice independent of ADA membership.

with Supreme Court Rule 17, and because the decision of the Ninth Circuit is correct.

Respectfully submitted,

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